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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1946

Texas Pacific Coal & Oil Company,
Petitioner
vs.
R. G. Calcote et al., *Respondents*

No. 642

On Petition for Certiorari to the Fifth Circuit

Petitioner's Motion for Rehearing

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On Petition for Certiorari to the Fifth Circuit

Petitioner's Motion for Rehearing

To the Honorable Supreme Court of the United States:

Texas Pacifc Coal & Oil Company, a corporation, respectfully moves the Court for a rehearing of its judgment denying writ of certiorari in the above cause, entered herein on November 18, 1946, to such end respectfully showing:

I.

A procedural question of the highest importance in the administration of justice by Federal Courts is presented in this case, wherein the Honorable Fifth Circuit Court of Appeals has held drectly contrary to the decision of this Honorable Court in the case of *Bourdieu v. Pacific Western Oil Co.*, 299 U. S. 65, 81 L. Ed. 42, and to that of the Ninth Circuit in the case of *Verde River Irrig. & Power Dist. v. Salt River Valley Water Users' Assn.*, 94 F. 2d 936, 940, in this:

(a) In this case (now reported 157 F. 2d 216), without determining whether plaintiffs' petition in the trial court stated a cause of action, or whether they had a right to recover against any person (or even whether the such additional parties might be entitled to relief),[1] the Honorable Fifth Circuit reversed the judgment of the trial court in favor of Petitioner and remanded it to the District Court of the United States for the Southern District of Mississippi, with directions to make certain royalty owners parties (which duty rested upon plaintiffs in the first instance), thus requiring great additional delay and expense, regardless of whether or not such procedure would serve any useful purpose, or would be a "vain waste of time." *(Bourdieu v. Pacific Western Oil Co.*, 299 U.S. 65, 71, 81 L. Ed. 42, 46).

(b) In the case of *Bourdieu v. Pacific Western Oil Co.*, 299 U.S. 65, 81 L.Ed. 42, this court expressly held the contrary to be the proper procedure, first deciding that the trial court should have dismissed the case for want of a cause of action (the Ninth Circuit Court of Appeals having ordered a dismissal because the United States was a necessary party and could not be sued) and therefore reversing the judgment appealed from, expressly refusing to pass upon the question of whether the alleged indispens-

[1]Petitioner earnestly insisted in the Honorable Fifth Circuit Court of Appeals that no cause of action was stated by plaintiffs, and that under the pleadings and uncontroverted facts the new parties (if and when made) would themselves have no justiciable rights (R. pp. 341-381), which contention was reiterated in petitioner's application for certiorari herein. (Petition for Certiorari, pp. 32-54; pp. 22-27.)

able party was necessary or not (the only point decided by the Circuit Court of Appeals, 299 U.S. 69, 81 L.Ed. 45, 80 F. 2d 774), saying that:

> *"Nothing is to be gained by an inquiry into the status of absent parties when it is certain upon the face of complainant's bill that in no event will he be entitled to a decree in his favor."* (299 U.S. 71, 81 L.Ed. 46.)

(c) In Verde River Irrig. & Power Dist. v. Salt River Valley Users' Assn., 94 F. 2d 936, the appellant sued to have adjudged valid certain alleged easements and rights of way; to have a contract adjudged void, and for injunctive relief. On appeal appellee presented for consideration questions regarding alleged indispensable parties, which objections were brushed aside by the Ninth Circuit, following this Court's decision in the *Bourdieu* case, the Court saying:

> *"Appellee raises several questions regarding indispensable parties, as well as questions on the merits. In Bourdieu v. Pacific Oil Co., 299 U. S. 65, 70, 57 S. Ct. 51, 53, 81 L. Ed. 42, it is said: 'The rule is that if the merits of the cause may be determined without prejudice to the rights of necessary parties, absent and beyond the jurisdiction of the court, it will be done.' On page 71, of 299 U.S., 57 S.Ct. 51, 53, 81 L.Ed. 42, it is said:* **'the obvious reply of the court to a suggestion that other parties are indispensable is that, since the bill states no cause of action against any one, the rights of absent parties are in no way threatened by it'."**

II.

Aside from the fact that the Fifth Circuit in this case has wholly disregarded, as it did in the *Sneed* case *(Sneed v. Phillips Petroleum Co.*, 76 F. 2d. 785), the pronouncement of this Court on an important question of procedure, and also holds contrary to the Ninth Circuit in the *Verde River* case above cited, it is apparent that the rule announced by the Fifth Circuit is calculated to retard the administration of justice, rather than to simplify procedure, and greatly increase the cost of litigation. For, under the decision in this case, after approximately two years delay, the District Court must require the making of many new parties before it can determine whether plaintiff is entitled to proceed against anyone. In the *Sneed* case *(Sneed v. Phillips Pet. Co.*, 76 F. 2d 785), many thousands of lease and royalty owners within the 350,000 square miles of the great Panhandle gas reservoir would have had to have been appropriately summoned (and necessarily at great expense) before the Federal District Court could under the opinion of the Fifth Circuit Court of Appeals proceed to a determination of whether plaintiff was entitled to recover against anyone. It is urgently insisted that the majority of the Fifth Circuit was wrong and that this Court and the Ninth Circuit were correct. The importance of the procedural rule to litigants in the Federal Court is apparent.

Petitioner, in the conduct of its case in the United States District Court, was entitled to rely upon and follow the rule of procedure announced by this Honorable Court in *Bourdieu v. Pacific Western Oil Co.*, 299

U.S. 65, 81 L.Ed. 42, until this court itself holds the rule that it there announced (*generally and not restricted in any sense)* is applicable only to the case then before the court, and can be disregarded at will by lower courts.

A contrary rule of procedure, however, was announced by the Fifth Circuit in the Sneed case (76 F. 2d 785) and followed in this case (although as we earnestly insist it is directly in conflict with the Bourdieu case by this court and the Verde River case by the Ninth Circuit (94 F. 2d 936). If the Bourdieu case is correct, the rule it announces is of the utmost importance in the administration of justice by the Federal Courts, and we urgently request this Honorable Court to take jurisdiction and to announce a rule hereafter binding on all Circuits alike.

III.

That the petition of plaintiffs did not state a cause of action entitling them to any relief against petitioner we think also is apparent from the decisions urged in our petition for certiorari. This court may feel that the duty rests in the first instance on the Honorable Fifth Circuit to determine, not that the petition presented a substantial claim (opinion on rehearing, R. p. 385-6), but whether or not a cause of action entitling plaintiffs to recover was stated, and reverse the case to the Honorable Fifth Circuit for such purpose, as was done in *Cities Service Oil Co. v. Dunlap*, 308 U. S. 208, 84 L. Ed. 196, in a somewhat similar situation to that here presented.

IV.

Copies of this motion have been mailed by registered mail to Hon. Forrest B. Jackson, Century Bldg., Mississippi, and Hon. Charles F. Engle, Natchez, Mississippi, attorneys for respondents, on the same day this motion is being forwarded to this court.

V.

WHEREFORE petitioner respectfully prays that a rehearing be granted it; that writ of certiorari issue herein, and that proceedings be had as originally prayed in petitioner's application therefor. In the alternative, that writ of certiorari be granted herein, that this Honorable Court announce the correct rule of procedure applicable to this and other similar cases, and remand the case to the Honorable Fifth Circuit for a determination of whether the plaintiff's petition states a cause of action, all of which is respectfully prayed.

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Of Counsel.

STATE OF TEXAS)
COUNTY OF TARRANT)

DAVID B. TRAMMELL, a member of the Bar of this Honorable Court, and one of the attorneys of record for petitioner, hereby certifies that he one of counsel preparing and presenting this motion; that it is presented in good faith and not for delay.

DAVID B. TRAMMELL

ACKNOWLEDGMENT OF SERVICE FOR MOTION OF REHEARING

We hereby acknowledge receipt of a copy of this motion of petitioner, Texas Pacific Coal & Oil Company, for rehearing of the order of the judgment of ths court denying petition of certiorari in the above cause, this.....day of December, 1946.

FORREST B. JACKSON

CHARLES F. ENGLE

Attorneys for Respondent,
R. G. Calcote et el.